

Date: July 10, 1995

Case No.: 94-ERA-25

In the Matter of:

B. SCOTT DAVIDSON,
Complainant

v.

TEMPLE UNIVERSITY,
Respondent.

Claude I. Schoenberg, Esq.
For the Complainant

Michael M. Baylson, Esq.,
Linda M. Doyle, Esq.,
Leslie Muhlfelder, Esq.,
For the Respondent

BEFORE: THEODOR P. VON BRAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. §5851. Scott Davidson, Temple University's Director of Radiation Safety, in January 1994 complains he was discharged on January 31, 1994 for raising safety concerns under Nuclear Regulatory Commission regulations. He filed his complaint in this proceeding on March 30, 1994, which duplicated his prior correspondence of February 18, 1994 with the Wage Hour Division of the Employment Standards Division in Washington, D.C. On April 29, 1994, the District Director of the Employment Standards Administration Wage Hour Division in Philadelphia, Pennsylvania, found the allegations of the complaint sustained and ordered various forms of relief including reinstatement and back pay. Temple University filed a timely appeal. The hearing herein was held in the period June 21 - June 24 and August 16, 1994.

FINDINGS OF FACT

I. Identity and Background of the Parties

A. The Complainant

1. Barry Scott Davidson, Complainant, was hired by Temple University for the position of Director of Radiation Safety and Radiation Safety Officer effective January 3, 1994. Mr. Davidson, who has a Master's degree in Radiological Health, is a certified health physicist. (Davidson 11, 14). His prior experience includes working as a Nuclear Regulatory Commission (NRC) inspector at a nuclear facility. (Davidson 14). Complainant's last employer before coming to Temple was the Boston Edison Nuclear plant where he was employed as a training instructor in the nuclear training department. (Davidson 15-16).

2. Mr. Davidson, while employed at Temple, was under the supervision of Dr. Alan Moghissi, the University's Associate Vice President for Environmental Health and Safety. (Davidson 26, 31).

B. The Respondent

3. Temple University, of the Commonwealth System of Higher Education (Temple or Respondent), is a Pennsylvania non-profit corporation which is located in Philadelphia, Pennsylvania. It owns and operates Temple University Hospital which is a provider of inpatient hospital services under the Pennsylvania Medical Assistance Program.

4. Temple is licensed by the Nuclear Regulatory Commission (NRC) for the possession and medical use of radioactive byproduct materials. One of the three NRC licenses that Temple had at the time it terminated Davidson was a Type A Broad Scope license to possess and use radioactive byproduct materials. The University uses radioactive byproduct materials for medical diagnosis, treatment, and research. (Stipulated). It has approximately 140 researchers authorized to use radioactive materials. (CX 16 p. 14).

II. Temple's NRC License Renewal and Related Regulations

5. Temple's NRC license under consideration here is broad scope Type A license No. 37-00697-31. Under a broad scope NRC license, a researcher or physician need not request a license from the Agency to use radioactive materials, instead, the organization authorizes the researcher to utilize such materials. Under the broad scope license many of the functions of the NRC are performed by the on-site licensee itself. (Moghissi 641).

6. Medical institution licensees of the NRC are required to establish a Radiation Safety Committee to oversee the use of byproduct materials. (Section 35.22). Among other requirements, NRC licensees must designate a Radiation Safety Officer (RSO) as a member of that committee. (Id.). NRC regulations define the responsibilities of the Radiation Safety Officer and the Radiation Protection Committee as follows:

§35.23 Statements of authority and responsibilities.

(a) A license shall provide the Radiation Safety Officer, and at a medical Institution the Radiation Safety Committee, sufficient authority, organizational freedom, and management prerogative, to:

- (1) Identify radiation safety problems;
- (2) Initiate, recommend, or provide corrective actions; and
- (3) Verify implementation of corrective actions.

(b) A licensee shall establish and state in writing the authorities, duties, responsibilities, and radiation safety activities of the Radiation Safety Officer, and at a medical institution the Radiation Safety Committee, and retain the current edition of these statements as a record until the Commission terminates the license.

7. In short, the regulations provide that the Radiation Safety Officer and Radiation Protection Committee must have sufficient authority and organizational freedom to identify problems and initiate corrective action in the radiation safety program. (Lambert 340).

8. Linda Knight, a research professor of diagnostic imaging at Temple, became Chairperson of the Radiation Protection Committee in 1992 and was still in that position in 1994 during the time relevant to this proceeding. (Knight 967, 969).

9. Respondent had been in the process of renewing its license since 1989 and such renewal was still pending at the time of Complainant's employment with Temple in January, 1994. The consequences of losing a license would be that major operations in Temple's hospital would be shut down including most of the research in the medical school. (Knight 973-974).

10. In the fall of 1993, the license was still under "timely renewal" until final action on the license. The remaining issue to be resolved was the development of a decommissioning funding plan. (CX 20; Lambert 345; Knight 973). If a licensee is authorized to possess a quantity of radioactive materials deemed significant under the regulations, a financial reserve is required to offset the decommissioning costs involved in the failure of a licensee, including clean up. (Davidson 32).

11. Developing a decommissioning funding plan requires considerable effort. It is necessary to have a fairly extensive record of where spills of radioactivity may have occurred, how the facilities have been used, the extent of the ventilation systems and their contamination. The costs of decommissioning must be estimated and a determination made whether the licensee's financial

reserves are adequate to cover such costs. In addition, such reserves must be periodically re-evaluated. (Davidson 67).

12. A license amendment lowering the quantities of radioactive materials a licensee is authorized to possess below specified limits would preclude the need to develop a decommissioning funding plan, if such quantities were below the level requiring decommissioning funding. Such limits are set forth in 10 C.F.R. §30.35. (Davidson 32, 68).

13. Keith Brown of the NRC estimated that in the case of a broad scope license developing a decommissioning funding plan could take from several months to half a year. In his view a license amendment could take from three weeks to six weeks. (Brown 233, 245-246).

14. The NRC first notified Temple of the requirement that a decommissioning funding plan be developed in the summer of 1993. (Lambert 346).

15. The new Part 20 regulations had not been fully implemented at Temple by October 1, 1993. Kent Lambert, Temple's RSO, up to that date had not spent a great deal of time on the issue of license renewal. It was not his highest priority. At the time, he was involved in implementing changes in the Radiation Safety Program. He considered training a higher priority than decommissioning funding. (Lambert 348).

16. In March of 1993, Dr. Moghissi had summarized the renewal process for Temple's NRC license as follows:

Temple has been in the process of renewing its license since 1989. Apparently the submissions have been unsatisfactory because normally a license renewal requires anywhere between 6-18 months depending upon the complexity of the license. A broadscope license should not take more than 12 months. Therefore in February 1993, it has taken almost four years and the license renewal is far from complete.

(CX 23; Moghissi 639-640)

17. After Kent Lambert left Temple on October 1, 1993, the NRC required an amendment to Temple's license naming an appropriate individual to replace him as RSO. The designated replacement was Kurt Bodison. (Brown 244; Lambert 358). Bodison was named acting Radiation Safety Officer on or about October 3, 1993. (Stipulated).

18. When Kurt Bodison was acting as Radiation Safety Officer, the NRC had seen little activity in terms of responding to the NRC's request for information concerning the license renewal. (Brown 270).

19. On November 12, 1993, the NRC wrote to Temple in pertinent part as follows:

This is in reference to your application for renewal of License No. 37-00697-31. The quantities of byproduct material currently authorized by your license and requested in your renewal application require that you submit a decommissioning funding plan in accordance with 10 C.F.R. 30.35 (enclosed). Please submit the required decommissioning funding plan or modify your requested license authorization so that the plan will not be required. If you choose the latter option, please refer to Regulatory Guide 3.66 (enclosed) for assistance in preparing the request.

(RX 4)

20. The NRC requested a response within 30 calendar days. (Id.).

21. On December 28, 1993, Dr. Moghissi replied to the NRC's letter stating:

Referring to your letter dated November 12, 1993, the quantities of byproduct material requested in our renewal application for License No. 37-00697-31, would require us to submit a decommissioning funding plan in accordance with 10 C.F.R. 30.35. I would greatly appreciate and hereby formally request that an extension be granted to Temple University for the submission of the required plan.

As you know, Temple University's Radiation Safety Officer and Director of the Radiation Safety Department resigned effective October 1, 1993. The hiring of a permanent replacement as well as that of another experienced Health Physicist is imminent. I feel that these individuals should be given a chance to evaluate this project and to help develop the required decommissioning funding plan.

(RX 5)

22. The NRC in response granted a 30-day extension. (Brown 250).

23. On February 3, 1994, Frank Costello, an NRC official, called Temple because correspondence with Respondent had not been effective in the past. Respondent had been under an obligation to meet the regulation for some three and a half years earlier and the regulation had been specifically called to Temple's attention by the NRC six months earlier. (Brown 268). In addition, after Davidson's termination, the NRC was concerned as to whether there was a functioning radiation safety office. (Brown 270-271).

24. Mr. Costello, who was unable to speak to Dr. Moghissi because of the latter's absence, told Betty Brown, Director of Temple's Training and Information Department, that an extension could not be granted and that a copy of Temple's plan must be submitted immediately or the license would be revoked. Costello, after further discussion, agreed that the plan could be submitted early the following week. (RX 11).

25. On February 4, 1994, Temple, in a letter signed by Dr. Moghissi, requested a possession limit amendment to License No. 37-00697-31. (CX 25; RX 12; Brown 260). Temple's

letter of that date, however, did not meet the applicable regulation, according to the NRC's letter dated February 9, 1994. (Brown 261; RX 14). On February 24, 1994, Temple submitted another change in the requested possession limits. (Brown 262; CX 15). On April 14, 1994, the NRC, responding to Temple's letters dated February 24, 1994, March 8, 1994 and March 9, 1994, again rejected the proposed possession limits submitted by Temple. (CX 17). On May 11, 1994, Temple, under the signature of Kurt Bodison and Alan Moghissi, again submitted proposed possession limits on radionuclides in lieu of a decommissioning funding plan. (RX 25). This was the final letter in the renewal process prior to issuance of the renewal. The license was finally renewed on May 24, 1994. (RX 24; Brown 265-266).

III. 10 C.F.R. Part 20

26. 10 C.F.R. Part 20 are the NRC regulations for standards of protection against radiation. The deadline for implementation of the new Part 20 regulations was January 1, 1994. This meant full and not partial implementation by January 1, 1994. (Davidson 16, 114; Lambert 367).

27. According to Kent Lambert, certain changes were needed to fully implement 10 C.F.R. Part 20 by January 1, 1994. He outlined them as follows:

Well, there's a whole series of things. Some of them included minor editorial changes to forms to reflect new terminology. Others were a little more, more important such as addressing the dose limits to individual members of the public and how that would affect visitors in patient rooms.

(Lambert 350)

28. One of the regulations is concerned with high radiation areas in certain patient rooms. Some patients, treated with radioactive material, due to their treatment are surrounded by radiation levels classified by the regulations as constituting high radiation areas. (Brown 230). Patients receiving such radioactive treatments emanate radiation. According to Complainant, a patient may emanate enough radiation to constitute a high radiation area. (Davidson 95-96). The level of radiation escaping the patient will vary depending on the prescribed dose, the prescribed isotope, the type of treatment and possibly other factors. (Brown 250-251).

29. When Davidson suggested to Keith Brown that visitors could not be allowed in patient rooms, Brown replied:

I believe what I said was, upon a suggestion that visitors couldn't be allowed in the rooms, that each licensee must decide how they will implement the reg. How the [sic] will meet the regulation and should they decide to prohibit visitors that is agreeable with the NRC but it is certainly not the only way to meet that regulation.

(Brown 251)

30. The NRC has given the following guidance on this subject:

What is the dose limit for visitors entering a restricted area, e.g. visitors to hospital, patient's relatives, escorted tourists?

Answer: Occupational dose limits apply to all individuals who enter a restricted area. This is also the case under the old part 20. Visitors to a hospital, patient's relatives, escorted tourists who do not enter a restricted area are not subject to the occupational dose limits. Therefore, there is a need to clearly designate the particular areas in a hospital that are restricted areas.

(Brown 240, 256; CX 11)

IV. Complainant's Employment at Temple in January 1994

31. In a letter dated January 10, 1994, Dr. Moghissi referred to Scott Davidson as "Director of Radiation Safety and Radiation Safety Officer effective January 3, 1994." (CX 7; Davidson 29). It was understood that Complainant was hired in the expectation that he would eventually be the RSO. (Knight 1036). The job description of Director of Radiation Safety, moreover, states that one of the essential functions is to serve as the University's Radiation Safety Officer. (CX 3 p. 1).

32. Dr. Moghissi agreed that Complainant could not at the beginning have performed all the functions of his position since he was "green". (Moghissi 572).

33. Keith Brown of the NRC advised Complainant that the Agency required a request from Temple's management to name him as RSO. (Brown 243). However, Mr. Davidson was not in fact named as such. (Brown 269; see also Knight 978-980). It was the expectation of the Chairperson of the Radiation Protection Committee that Complainant would be named as RSO or at least that the Radiation Protection Committee would vote on him. (Knight 1013).¹

34. Complainant, on his first day of employment, January 3, 1994, met with Dr. Moghissi who on that day set Mr. Davidson's priorities. Davidson's initial priority was to develop and implement either a decommissioning funding plan or a license amendment which would obviate the need for a decommissioning funding plan. (Davidson 32, 34). Moghissi also gave Complainant the assignment of implementing the radiation safety program and developing a radiation safety guide. (Davidson 35, Moghissi 642).²

¹Davidson had not during his employment formally applied to be named as RSO stating he intended to do this as part of the general license amendment application. (Davidson 287).

²Dr. Moghissi's strategy for developing a radiation safety guide or procedure was outlined as follows:

35. Davidson, in his first week of employment at Temple, spent most of his efforts getting a grip on the job and getting up to speed on the license. (Davidson 52-53, 55).

36. Davidson felt an inventory of radiation materials used and in storage was prerequisite to a determination of whether amending the possession limits was a viable alternative to the decommissioning funding plan. (Davidson 61-62). According to Davidson, a complete inventory of radioactive materials establishes a pattern of use of radioactive materials so as to put him in a position to know which of Temple's authorized users would be adversely affected by lower possession limits. (Davidson 62-63).

37. On Monday, January 12, 1994, Moghissi and Davidson discussed implementing a decommissioning funding plan or license amendment in connection with the license renewal, as well as the new 10 C.F.R. Part 20 pertaining to the presence of visitors in patient rooms when the patients were receiving therapeutic quantities of radioactive iodine. (Davidson 92). Complainant, on January 12, told Moghissi Temple was potentially in non-compliance because of the presence of visitors in rooms of patients who had received radioactive medicines. (Davidson 93).³

Fundamental Strategy:

The NRC must be provided with a minimum amount of information sufficient to grant a license. Both NRC and agreement states consider the conditions of license binding upon licensees. Therefore, any details given during the license application are considered binding. For example, a procedure that describes a wipe testing and is submitted as a part of license is binding and any change in this process would require an amendment. If a licensee does not live up to the procedure, an inspector will consider it a violation. There is nothing in the regulations that requires the inclusion of a wipe testing procedure in the license application. However, many licensees make the mistake of doing precisely that. In summary, this strategy suggests the development of policies that are brief and clear for submission to the NRC. Fortunately, the handbook from the University of Maryland contains most, if not all, of the needed policies and they can be used with minor modifications.

The "Strategy for the Development of a Center of Excellence" includes a description of policies, procedures and guides. Accordingly, this proposal assumes that policies will be developed quickly enough to meet the NRC deadline. We will not submit any procedure or guide as part of our license application. However, we will diligently develop our guide within a year and our procedure within eighteen months. These will then be available to everyone but cannot be used by the NRC to cite us.

(CX 23; emphasis supplied)

³Dr. Moghissi confirmed that he and Complainant discussed full implementation of 10 C.F.R. 20 and that Davidson told him that visitors to Temple's patients who had received radioactive treatment were improperly visiting such patients. (Moghissi 688-689).

38. Moghissi responded that the NRC had misinterpreted the standard and that if the NRC ever gave Temple a violation in this area he would take it up to the President of the United States. Davidson felt that Moghissi was not interested in the effect of the new Part 20 on this situation. The discussion became heated. Davidson maintained the issue was important and Moghissi said it was not. Dr. Moghissi told Davidson that he should stick to the decommissioning issue and that the radiation safety issue concerning visits to patients receiving radioactive treatment was number 65 on his list of priorities. (Davidson 102, 108).

39. On the same day, January 12, after that meeting, Betty Brown, Moghissi's Administrative Director, came to Davidson's office. (Davidson 115). She told Complainant he could not challenge Dr. Moghissi's authority, that things might not work out and that Davidson might consider not moving his family down from Massachusetts to Philadelphia. Betty Brown's statements frightened Complainant, who feared the loss of his job. (Davidson 116-117). On Monday, January 17, 1994, Davidson apologized to Moghissi for his outburst on January 12 stating he had been out of line. (Davidson 133-136).

40. Dr. Moghissi agreed to the license amendment or possession limit approach as an alternative to the requirement for the decommissioning funding plan. He wanted to take the approach which would complete the license renewal in the most expeditious manner. (Davidson 120). Davidson continued to work on the license amendment specifically attempting to conduct inventories of radioactive materials on hand at Temple. (Davidson 120-121).

41. On January 17, Davidson worked on decommissioning funding or the alternative to that, the license amendment, radiation safety and getting charge of the group, such as parcelling out assignments and counseling employees on personnel matters, etc. (Davidson 137).

42. On Thursday, January 20, Davidson had another meeting with Dr. Moghissi. He wanted to discuss issues concerning Part 20 implementation not yet resolved. (Davidson 144). Moghissi however did not want to discuss these questions. Davidson felt he "was basically chased out of the room". (Davidson 148-149). Complainant, who was upset, called Keith Brown of the NRC to discuss license amendment issues and Part 20 implementation. (Davidson 150). Davidson told Brown that he was not yet ready to ask for an NRC inspection feeling that he had not exhausted all internal remedies such as talking to the Chairperson of the Radiation Protection Committee. (Davidson 150).

43. On Friday, January 21, Davidson had a staff meeting. There was discussion that the inventory of radioactive materials was incomplete, no data having been obtained from the Physics Lab. (Davidson 153-154).

44. On Monday, January 24, Davidson tried to bring up some of the Part 20 issues. He was unsuccessful; Dr. Moghissi just started talking, cutting him off. (Davidson 157). On Tuesday,

January 25, Complainant worked on the license amendment by manipulating data and working on a spreadsheet. (Davidson 165).

45. On Wednesday, January 26, 1994, there was a meeting on the decommissioning funding plan or license amendment in Dr. Moghissi's office. (Davidson 166). Previously Davidson had told Moghissi of the choice to proceed with the license amendment as an alternative to a decommissioning funding plan. Moghissi had concurred with that choice. (Davidson 168). Davidson, after that meeting, went to his office and printed out a draft memorandum pertaining to the decommissioning funding plan and the alternative approach, the license amendment. (Davidson 170). Complainant, stating it was a draft memorandum and not final, presented it to Dr. Moghissi. (Davidson 170-172).⁴ The draft memorandum was incomplete because Complainant had not yet received the inventory from the main campus and he had not verified his calculations. (Davidson 170; CX 13).

46. John Miller drew upon Davidson's memorandum, CX 13, in generating some of the information contained in CX 25, Temple's memorandum dated February 4, 1994, proposing possession limits in connection with the application for a license renewal. (Miller 1117-1118). It appeared to Miller, particularly after conversations with Keith Brown, that Davidson was going in a direction that would be workable. (Miller 1119). In any event, certain of the possession limits in the license amendment granted by the NRC are identical to calculations prepared by Mr. Davidson in his draft memorandum. (CX 13; Davidson 199-200).

47. At the meeting on January 26, 1994, Davidson also mentioned he had contacted the NRC concerning decommissioning and new Part 20. Moghissi responded that if Complainant wanted to go to the NRC, he had to go through him. (Davidson 173-174).

48. On January 26, 1994, Dr. Moghissi notified the manager of Employee Relations that he had decided to terminate Mr. Davidson stating:

I have reluctantly decided to terminate the employment of B. Scott Davidson as Director, Radiation Safety Department and Radiation Safety Officer, Office of Environmental Health and Safety. During the last few days I have observed his performance carefully and have come to the conclusion that it is unlikely that he will be able to function in a medical/research atmosphere.

I am requesting your advice and guidance on appropriate actions to inform him of this decision.

(CX 22)

⁴Moghissi asserts the memorandum was not given to him by Complainant and that the document had been discovered a few days prior to the hearing in Temple's offices. (Moghissi 672-673).

49. Dr. Moghissi, on January 26, 1994, also advised Dr. Knight that he was going to terminate Davidson. She responded that she was surprised because in her limited experience in dealing with Davidson she had been very satisfied and impressed with his performance. (Knight 983-984, 1013).

50. On January 31, 1994, Complainant was dismissed by Dr. Moghissi. Betty Brown was present at that meeting. (Davidson 185). According to Complainant, the reason for the termination was that he did not share Moghissi's vision or management style and he had not completed the decommissioning funding plan, his number one priority. (Davidson 185-186).

51. Kent Lambert and Davidson in January, 1994, had discussed implementation of the new Part 20 regulations including the issue of visitors to Brachy therapy rooms. (Lambert 353-354). In the last conversation Kent Lambert had with Davidson, before he was terminated, Complainant indicated he had had an argument with Dr. Moghissi on implementation of the radiation safety program. According to Mr. Lambert "Well, one of the things was certainly new 10 C.F.R. Part 20." (Lambert 355).

52. Davidson also discussed on one occasion with Dr. Knight his concern that visits to a radionuclide therapy patient's room might not be in compliance with the new Part 20 regulations. (Knight 981). She thought that Complainant was working diligently to resolve the issue of visitor access to rooms of patients under radionuclide therapy. (Knight 1038). It was also obvious to Dr. Knight from her contacts with Davidson that he was working on the decommissioning funding plan. (Knight 982).

53. In a memorandum dated March 10, 1994, to Temple's Executive Vice President, Dr. Moghissi responded to the NRC investigation conducted on February 10, 15 and 16, 1994. (CX 28). The NRC issued a notice of violation dated March 17, 1994. (CX 16).⁵ On April 7, 1994, that agency advised Mr. Davidson that several of his concerns relating to the implementation of the new 10

⁵Results: Five violations were identified: 1) failure of the Radiation Protection Committee to designate all users of licensed material prior to use per License Condition 11.A. of License No. 37-00697-31 (Details, Section 4); 2) failure of the Radiation Protection Committee and the University Provost to approve the management representative on the committee as required by License Condition 31 of License No. 37-00697-31 (Details, Section 4); 3) failure to perform bioassays weekly as required by License Condition 31 of License No. 37-00697-31 (Details, Section 7); 4) failure to name the Radiation Safety Officer on all subcommittees of the Radiation Protection Committee as required by License Condition 31 of License No. 37-00697-31 (Details, Section 4); and 5) failure to provide training, pursuant to 10 C.F.R. 19.12, on the requirements of 10 C.F.R. Part 20 (effective January 1, 1994) to all personnel working in or frequenting any portion of a restricted area (Details, Section 7).

C.F.R. Part 20 and administration of the radiation safety program had been substantiated. (CX 16).

V. Dr. Moghissi's Attitude Towards the NRC and the Radiation Protection Committee

54. It was Dr. Moghissi's policy to provide the NRC with the minimum amount of information sufficient to grant a license, in order to minimize Temple's exposure to NRC enforcement. (See note 2, supra.).

55. The Chairperson of the Radiation Protection Committee is of the opinion that Dr. Moghissi has tried to interfere with the operation of the committee:

THE WITNESS: Well, one main issue is that he has not kept us informed. He has selectively screened the information that he sends on to the committee. I don't feel that the committee is sufficiently informed about NRC correspondence, and other things to be able to take appropriate action if needed. That's just one example.

(Knight 1022)

56. On August 6, 1993, Kent Lambert, the RSO, wrote a memorandum to Betty Brown, the Director of Training and Information, complaining of a lack of support for radiation safety training. Copies were distributed to Dr. Moghissi and Dr. Knight, Chairperson of the Radiation Protection Committee. (Lambert 336; CX 19). Dr. Moghissi was visibly upset that Lambert had "aired dirty laundry" by sending a copy of the memorandum to the Chairperson of the Radiation Protection Committee. Moghissi told Lambert "this was not a firing offense this time." (Lambert 336-339). The RSO felt, as a result, "There was now a barrier between what had been relatively free communication between the chairperson and me." (Lambert 341).

DISCUSSION

This is a proceeding under the employee protection provisions of the Energy Reorganization Act brought by Scott Davidson, the Complainant, against Temple University (Temple) of Philadelphia. Mr. Davidson, who was employed as Director of Radiation Safety by Temple for a month in January, 1994, alleges that he was terminated for raising concerns as to compliance with Nuclear Regulatory Commission (NRC) regulations. (Finding 1).

Temple asserts Mr. Davidson is not entitled to relief. It contends that he in fact did not engage in protected activity and that even if he did, his firing was not retaliatory but for valid business reasons, namely, incompetence and insubordination. Respondent asserts in any event that, if Complainant has demonstrated that he was terminated for both illegal and valid business reasons, he would have been fired for legitimate reasons even absent the protected activity and thus under no circumstances is entitled to relief.

Applicable Legal Principles

To invoke the protection of the whistleblower statutes, an employee must show that: 1) he engaged in protected conduct; 2) the employer was aware of said conduct; and 3) the employer took some adverse action against him. The employee must also present evidence to raise the inference that the protected conduct was the likely reason for the adverse action. Dartey v. Zack Company of Chicago, Case No. 82-ERA-2, Secretary's Decision and Final Order (April 25, 1983) slip op. at 5-9.

If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate nondiscriminatory reasons. Id. If the employer is likewise successful, the burden shifts once again to the employee, who has the opportunity to demonstrate that the reasons proffered by the employer were not the true reasons for the employment decision. In that event, the trier of fact must decide whether the employer's proffered explanation is worthy of credence or whether the discriminatory reason alleged by the complainant was a more likely motivation. Id.

The presence or absence of retaliatory motive is a legal conclusion and provable by circumstantial evidence, even if there is evidence to the contrary by witnesses perceiving lack of improper motive. Id.

Complainant's Protected Activity in Context of The Factual and Regulatory Background

Temple University is a licensee of the Nuclear Regulatory Commission, holding three licenses from that Agency. The license relevant here is Broad Scope A License No. 37-00697-31. Respondent, which operates the Temple University Hospital, uses radioactive byproducts for medical treatments, diagnosis and research. The renewal process for Temple's Broad Scope A license began in 1989 or 1990. In the summer of 1993, the NRC notified Temple that in connection with the license renewal Respondent had to file a decommissioning funding plan. (Findings 3, 4, 9, 14).

A decommissioning funding plan is required where a licensee is authorized to possess a quantity of radioactive materials deemed significant under the regulations. Then a financial reserve is required to offset the decommissioning costs including clean up in the event that a licensee fails. (Finding 10).

A license amendment lowering the quantities of radioactive materials a licensee is authorized to possess below specified limits would preclude the need to develop a decommissioning funding plan, if such quantities are below the level requiring decommissioning funding. Such limits are set forth in 10 C.F.R. §30.35. (Davidson 32, 68; Finding 12).

Essentially no action was taken by Temple in 1993 to formulate either a decommissioning funding plan or its alternative, a possession limits amendment. Kent Lambert, the Radiation Safety Director and Radiation Safety Officer, considered the decommissioning funding plan a lesser priority than certain safety issues. (Finding 15).

On November 12, 1993, the NRC wrote Temple advising that a decommissioning funding plan or a modification of the license obviating the need for a decommissioning funding plan should be submitted. A response was requested within 30 calendar days. On December 28, 1993, the 30 day limit having already expired, Dr. Moghissi, the University's Associate Vice President for Environmental Health and Safety, requested a 30 day extension which was granted. (Findings 19, 20). In this connection he stated:

As you know, Temple University's Radiation Safety Officer and Director of the Radiation Safety Department resigned effective October 1, 1993. The hiring of a permanent replacement as well as that of another experienced Health Physicist is imminent. I feel that these individuals should be given a chance to evaluate this project and to help develop the required decommissioning funding plan.

(RX 5; Finding 21)

Scott Davidson, who commenced his employment on January 3, 1994, was the permanent replacement for the Radiation Safety Director and Radiation Safety Officer. John Miller, who began his employment on January 24, 1994, was the health physicist in question. (Finding 31).

Mr. Davidson, on his first day, January 3, 1994, was given the following priorities by Dr. Moghissi: renewal of Temple's license by developing and implementing either a decommissioning funding plan or its alternative a license amendment, and second, the implementation of Temple's radiation safety program and development of a radiation safety guide. (Finding 34).

Davidson in his first week on the job at Temple spent most of his time getting a grip on the job and getting up to speed on the license. On Monday, January 12, 1994, Moghissi and Davidson discussed the decommissioning funding plan or license amendment in connection with the license renewal, as well as the new 10 C.F.R. Part 20 pertaining to the presence of visitors in patient rooms when the patients were receiving therapeutic quantities of radioactive iodine. Complainant, on January 12, told Moghissi Temple was potentially in non-compliance because of the presence of visitors in rooms of patients who had received radioactive medicines. (Davidson 92-93; Findings 35, 37).

Moghissi responded that the NRC had misinterpreted the standard and that if the NRC gave Temple a violation in this area he would take it up to the President of the United States. Davidson felt that Moghissi was not interested in the effect of the new Part 20 on this situation. The discussion became heated. Davidson maintained the issue was important and Moghissi said it was not. Dr. Moghissi told Davidson that he should stick to the decommissioning issue and that the radiation safety issue concerning visits to patients receiving radioactive treatment was number 65 on his list of priorities. (Davidson 102, 108; Finding 38).

Dr. Moghissi described that conversation as follows:

Q Thank you. We'll move on to a different subject. You did discuss full implementation of 10 CFR part 20 with Mr. Davidson during his employment, didn't you?

A I suspect I did, but I don't have a specific recollection -- yes, I do have a recollection, yes.

Q You did discuss it?

A Yes.

Q And Mr. Davidson told you that in his opinion, visitors to Temple University patients, patients who had received radioactive treatment, were improperly visiting with those patients, correct?

A Yes.

Q And you and he engaged in a vigorous discussion over this issue of implementation, is that correct?

A Well, this issue, we did have a discussion on this issue, yes.

Q Would you describe it -- how would you characterize that discussion?

A If you could go into the details of the discussion it would characterize itself.

Q Would you describe it as friendly?

A It was not unfriendly.

Q Would you say that voices were raised?

A I have a very loud voice, and Your Honor, you have noticed it on occasion, the voice gets away with me, yes. This is a natural part of my -- and I'm sorry. This is a curse or a blessing as you want to look at it.

(Moghissi 688-689) (Emphasis supplied)

Dr. Moghissi also confirmed that he had told Complainant that these concerns were Number 65 on his list of priorities. (Moghissi 702-703). In short, Dr. Moghissi's testimony corroborates in

the main Complainant's version of this conversation on January 12. Dr. Moghissi confirmed that Complainant raised the issue of full implementation of 10 C.F.R. Part 20 and his related concern that there had been improper visits to patients receiving radioactive treatment at Temple University Hospital. (Findings 37, 38). Dr. Moghissi also conceded that he raised his voice during that conference thus contributing his share to the volatility of that discussion.

Complainant's concern raised in connection with the issue of visitors to patients undergoing radioactive treatments was premised on the assumption that the new Part 20 regulations required the exclusion of visitors from such patients' rooms. Davidson testified herein that Keith Brown of the NRC had told him that visitors must be excluded from the rooms of patients undergoing therapy with radioactive materials. Keith Brown had in fact told Complainant that excluding visitors from such rooms would be one way to comply but not the only way to comply with the regulations. Compliance with the regulations depends upon posting the high radiation area. (Findings 28, 29, 30). As Mr. Brown noted:

Q I believe what I said was, upon a suggestion that visitors couldn't be allowed in the rooms, that each licensee must decide how they will implement the reg. How the [sic] will meet the regulation and should they decide to prohibit visitors that is agreeable with the NRC but it is certainly not the only way to meet that regulation.

Q You began your answer by saying that the suggestion that no visitors be allowed. Who made that suggestion?

A Mr. Davidson.

Q Did he give you any basis for making such a suggestion?

A There is an area inside this room which is a high radiation area according to our regulations. You must, by the regulations, post an area as a high radiation area. And that area must include the area with a certain dose rate. It can be larger, you would post a very large area and you would include the high radiation area, that would be acceptable. His statement was that if you posted the patients' rooms, that is the room door as a high radiation area, then you wouldn't be able to put--allow a visitor into the room and, in fact, that is a correct statement.

(K. Brown 251-252) (Emphasis supplied)

In short, exclusion of visitors from patients' rooms by posting the entire room as a high radiation area would comply with the NRC regulations but would not be the only way to comply. If appropriate measurements of radiation were conducted, then the high radiation area could be

posted within the patient's room, thus permitting visitors. In that connection a radiation shield might also be used.⁶ (Findings 29, 30).

Mr. Davidson's concern is nevertheless protected. The employee protection provisions of the environmental statutes protect employees alleging employer violations of such Acts, even if the allegations are not ultimately substantiated. In this connection: "Were only actual and provable violations protected, employees could rarely be assured that the apparent violations they identify for reporting purposes would ultimately withstand the scrutiny required to gain protected status. Such a rule would so chill the reporting of violations as to virtually eviscerate the statute." Guttman v. Passaic Valley Sewerage Commissioners, Vol. 6 DOL Decisions No. 2, pgs. 261, 265 (1992). In this case, Complainant's concerns must be deemed not unreasonable. At the time he raised the concern in question on January 12, he had only been on the job some ten days and the new Part 20 regulations under consideration had become effective less than two weeks preceding his expression of concern. In addition, Mr. Davidson, as Respondent knew when he was hired, had no background in the operation of medical facilities. Finally, on January 12 he in fact believed that Keith Brown had told him such visitors must be excluded. (See infra pp. 20-21; Findings 28, 29). Moreover, treating the entire patient's room as a high radiation area would be one way to comply with the regulations. Under the circumstances, Mr. Davidson's expressions of concern cannot be considered frivolous and they were protected.

The record, accordingly, supports the finding that on January 12, 1994, Complainant expressed his concern that Temple was in non-compliance with the applicable NRC regulations pertaining to visits to patients under radioactive treatment, and that the resultant discussion became contentious. (Findings 37, 38). The record demonstrates that Complainant, on January 12, engaged in protected activity.

After that meeting on January 12, Betty Brown, the Chief Administrative Officer, and Dr. Moghissi came to an agreement that Brown, as personnel officer, should talk to Complainant. (Finding 39). She approached Complainant on the same day. Ms. Brown described the interview as follows:

A Okay. I approached him and I prefaced my statement that I was coming to him not as a colleague but as personnel officer for the department and I related the fact that Dr. Moghissi had indicated to me that Scott had been out of line in his discussions with him and specifically, basically stating that he didn't know what he was -- Scott told Dr. Moghissi, per Dr. Moghissi, that Dr. Moghissi did not know what he was talking about, or something to that effect. And I told Scott that Dr. Moghissi was having reservations about whether or not

⁶It was the personal policy of Dr. Charkes, the physician in charge of administering iodine-31 therapies at Temple that visitors be excluded for the first 24 hours. (Bodison 869-870, 878, 929).

he would work out and I was coming to him to communicate that to him and maybe he should think about whether or not he thinks, from Scott's perspective, that it would work out before he made the decision to move his family down to Philadelphia.

(Betty Brown 938)

The record compels the inference, because of the timing, that Betty Brown's visit, several hours later, was a veiled threat that Complainant would lose his job for disagreeing with his superior about the radiation safety issues in question. The record compels the further inference that since Betty Brown came as personnel officer and as a result of mutual agreement with Dr. Moghissi that the latter sanctioned such statements. Accordingly, Respondent Temple is responsible for the threat in question.

On January 31, 1994, Complainant's employment was terminated by Dr. Moghissi on the ground that he did not share Moghissi's vision and style and had not completed the decommissioning funding plan, his number one priority. (Finding 50). The decision to terminate Complainant had in fact already been made on January 26. (Finding 48). The chronology of these events, Complainant's protected activity followed several hours later by the personnel officer's threat and warning of dismissal with the actual decision to terminate occurring 14 days after the initial threat, compels the inference that Complainant's protected activity was the likely cause of his firing. Such temporal proximity is sufficient as a matter of law to establish the link between the protected activity and the retaliatory action complained of. Put another way, where the adverse action so closely follows the protected activity this is itself evidence of illicit motive. Assistant Secretary for Occupational Safety and Health, et al. v. HE&M Transportation, Inc., (Vol. 6 No. 1 DOL Decisions 170, 90-STA-44 Final Decision and Order 1992).

In sum, Complainant has demonstrated that on January 12, 1994, he raised safety concerns within the scope of NRC regulations, i.e., visits to patients undergoing radioactive therapy, that Respondent was aware of Complainant's protected activity and that this in turn was the likely cause of Mr. Davidson's termination. Complainant has established the elements of his prima facie case.

Rebuttal

Respondent asserts that Complainant's failure to complete the license renewal process and the radiation safety guide by January 26, 1994, the day that Dr. Moghissi decided to fire him, justified the termination. This position is untenable. The aforementioned chronology leading up to Mr. Davidson's firing is so compelling that on that ground alone this reason must be rejected.

A review of the surrounding facts and circumstances reinforces that conclusion. The license renewal process, beginning in 1989 or 1990, had been pending for at least three years and no conclusion was in sight in 1993. In the summer of 1993, Temple was warned it would have to satisfy

the requirements of a decommissioning funding plan or its alternative.⁷ As far as can be determined from this record, essentially no progress was made in 1993 in fulfilling this requirement, the then Radiation Safety Officer and Radiation Safety Director, Kent Lambert, having other priorities. Nor were any substantive steps taken by Kurt Bodison, the Acting Radiation Safety Officer who succeeded Lambert in October 1993. In fact, the only apparent concrete step taken by Respondent in the fall or winter of 1993 on license renewal was Dr. Moghissi's request for a 30-day extension more than two weeks after the expiration of the existing 30-day deadline imposed by the NRC on November 12, 1993. Temple's approach to license renewal was leisurely to a surprising degree considering the stakes for Respondent in the outcome of the process. After Mr. Davidson's termination on January 31, it took Respondent, after several rejections of its application, up to May 11 to finally amend its possession limits and secure its license renewal, a period of about 3 1/2 months. Davidson, on the other hand, had at best some three weeks to complete the license renewal process before the decision was reached to terminate him on January 26. Realistically speaking, Mr. Davidson had less time; of necessity he had to devote a substantial portion of his first week simply to get a grip on the job. (Finding 35). In addition, as Dr. Moghissi recognized, Complainant did not have a medical background and was "green" to the job. (Finding 32). These facts militate against a finding that Davidson's failure to complete the license renewal process on the radiation safety guide in his brief tenure at Temple was the real reason for his precipitous termination.

Furthermore, the record demonstrates that Dr. Moghissi had a grudging or minimalist approach to cooperation with the NRC and Temple's own Radiation Protection Committee. In the case of the NRC, it is his policy to give the agency the minimum amount of information necessary in order to decrease exposure to law enforcement by that agency. In the case of the Radiation Protection Committee, he also restricted the flow of information to that body by selectively screening information. In the same vein, he warned Kent Lambert, the then Safety Director, that sending a copy of Lambert's memorandum on training deficiencies and requirements to the chair person of the Radiation Protection Committee was not a "firing offense this time." (Lambert 337-339; Findings 54-56). The foregoing is indicative of a mindset hostile to the raising of protected concerns by Temple employees.

Respondent's contention that Mr. Davidson did nothing with respect to license renewal is rejected. In order to pursue the possession limits approach Davidson attempted to inventory the radioactive materials at hand for Temple's authorized users of these products. Davidson felt an inventory of radioactive materials used and in storage was prerequisite to determining whether the possession limits was a viable alternative to the decommissioning funding plan. Davidson felt that a complete inventory of radioactive materials would establish a pattern of use enabling him to determine which of Temple's users would be adversely affected by lower possession limits. (Finding 36). According to Respondent, an inventory was not necessary for calculating possession limits and that reliance on data such as purchases of materials would have sufficed. However, even Kurt Bodison acknowledged that under certain circumstances inventory figures would be required as for

⁷In fact, this requirement had been in effect with respect to Temple since January 27, 1990. (K. Brown 247-248).

example when the so-called unity rule comes into play in connection with possession limits. (Bodison 796-797).⁸ Under the circumstances, despite the difference of opinion on this question, the record compels the conclusion that Davidson's efforts to secure inventory figures were a good faith effort to implement the license amendment approach to Temple's license renewal.

Furthermore, Complainant who had entered inventory data on a spreadsheet drafted a memorandum on the subject of decommissioning funding and possession limits. This memorandum was utilized in part beginning with the February 4 submission to the NRC pertaining to license renewal. John Miller, who utilized and reviewed Complainant's draft memorandum felt at the time that Davidson was going in a direction that would be workable. (Miller 1119). In short, Davidson did attempt to implement the possession limits approach to license renewal and considering his extremely brief tenure at Temple, Respondent simply has not made the case that lack of competence or a failure to work on this project was the true reason for his dismissal. In this connection, it is also worth noting that the chair person of the Radiation Protection Committee on the basis of her limited experience with Mr. Davidson had been very satisfied and impressed with his performance. (Finding 49).

Respondent also contends that Complainant was dismissed because of insubordination. The discussion between Mr. Davidson and Dr. Moghissi on January 12 became heated. For example, Complainant, among other things, apparently told Dr. Moghissi that the latter did not know how to

⁸The rule of unity applies to possession limits; it may be summarized as follows:

- A If only one radionuclide is possessed, the possession limit is the quantity specified for that radionuclide in 10 C.F.R. 33.100, Schedule A, Column I. If two or more radionuclides are possessed, the possession limit is determined as follows: For each radionuclide, determine the ratio of the quantity possessed to the applicable quantity specified in 10 C.F.R. 33.100, Schedule A, Column I, for that radionuclide. The sum of the ratios for all radionuclides possessed under the license shall not exceed unity.
(RX 14; See also 10 C.F.R. 33.11(b))

As Kurt Bodison testified:

- Q Why would you need an inventory with regard to the unity rule?
- A Because if you're under the restrictions of the unity rule, you would have to ratio the amount of material that you had on-hand with its -
- for each radio-nuclide [sic] with its specific limit and then sum that, and it would have to be less than one. If it was not, then you would be above your possession limits.

(Bodison 796-797)

run a radiation safety program. (Bodison 794; Findings 37, 38). In addition, Complainant essentially asserted that as Radiation Safety Officer he had an obligation and the discretion to set his priorities with respect to implementing NRC regulations affecting safety.⁹ An employee, otherwise protected, is not absolved from abusing his status and overstepping the defensible bounds of conduct. Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986). Here Complainant's language, while perhaps injudicious, did not overstep the defensible bounds of conduct as was the case in Dunham. Mr. Davidson's outburst is inextricably related to his expression of concern relating to possible violation of the new Part 20 regulations and his view as to the responsibility and discretion vested in the Radiation Safety Officer and is thus protected. Dr. Moghissi, for his, part raised his voice thus contributing to the heat of the occasion. Moreover, Davidson subsequently apologized for his remarks in that meeting. (Finding 39). Under the circumstances, Complainant was neither intransigent nor insubordinate. Respondent has failed to meet its burden of producing evidence that Complainant's discharge was motivated by a legitimate non-discriminatory reason on that score. See generally Kenneway v. Matlack, Inc. 88-STA-20 (1989) (Secretary's Final Decision and Order).

Credibility

Temple also contends that Complainant's case should fail because he is not a credible witness. There are some errors or misstatements in Complainant's testimony. For example, Keith Brown of the NRC did not tell Mr. Davidson, as Complainant testified, that visitors must be excluded from the rooms of patients under radioactive treatment. (See Tr. 95). In fact, as already noted, it is Mr. Brown's view that excluding visitors entirely from patients' rooms is one way but not the only way to comply with the regulations. An acceptable alternative method may be to mark and exclude access to high radiation areas within a patient's room.

However, Complainant's testimony that Keith Brown had told him that no visitors were allowed in rooms of patients undergoing therapy with radioactive materials must be regarded as truthful, although in error. His contemporaneous diary for January 12 notes that he spoke to Keith Brown on that day regarding the license amendment and peripherally with respect to visitors to patient rooms. The calendar for January 12 notes explicitly "he [Brown] says no visitors in hospital Brachy therapy rooms." (CX 10 p. 31). The record, on the basis of this contemporaneous note, compels the inference that Davidson in fact believed, although mistakenly, on January 12 and when

⁹Technically, Complainant was not the RSO; his name had not been submitted to the NRC; nor had the Radiation Protection Committee voted on him for that position. Nevertheless, he was clearly the RSO designate and it was the general expectation that he would be so named. As Radiation Safety Director, his job description explicitly included the functions of the RSO. Moreover, Dr. Moghissi referred to him as RSO. (Moghissi 725). Under the circumstances, Davidson's view that he had the responsibility of a RSO was not unreasonable. The applicable regulations clearly contemplated that an RSO should have considerable discretion in determining priorities. (See Findings 6, 7).

he testified at the hearing that Brown had told him that such visitors were to be excluded.¹⁰ Under the circumstances, the argument that Complainant did not carry his burden because of lack of credibility must fail. In any event, Dr. Moghissi and Ms. Brown, as already noted, in the main corroborate Complainant's expression of concern on January 12 and the reaction thereto.

Dr. Moghissi, it may be noted, has a credibility problem of his own on one central point relevant to the issues of Complainant's insubordination and competence. According to Dr. Moghissi, the draft memorandum, CX 13, prepared by Complainant relating to the decommissioning funding plan and possession limits was found in the offices of Kurt Bodison and John Meadow [sic] a few days before Moghissi's deposition in June 1994. Dr. Moghissi, moreover, does not recall Complainant giving him this document. (Moghissi 672-673; Finding 45).

John Miller, the health physicist, recalls that on the day of Complainant's termination "I believe, that day that Dr. Moghissi handed Scott's memo to me. And said that he really couldn't understand what Scott was trying to do in that memo." (Miller 1114).¹¹ Miller who had input into Temple's February 4, 1994 application for a possession limits amendment, CX 25, relied in part on Davidson's memorandum in generating some of the information on that document. (Miller 1115-1118; Finding 46).

There is a clear conflict in the testimony on this point. Miller's testimony is that Dr. Moghissi gave him the document before February 4. This cannot be reconciled with Dr. Moghissi's testimony that he did not see Davidson's memorandum until just prior to his deposition in June. Mr. Miller, the more disinterested witness, who could recall how he utilized Mr. Davidson's memorandum in contributing to the February 4, 1994 possession limits application, is the more persuasive witness on this point. This is a factor to consider in weighing Dr. Moghissi's assessment of Scott Davidson's competence, as well as the issue of insubordination.

Remedy

Complainant, having been illegally dismissed from his employment, is entitled to reinstatement with back pay to his former position at Temple and restoration of health, pension, and insurance

¹⁰According to Leslie Wong, prior to her radiotherapy treatment on January 17, Davidson told her that the benefits of a visit from her parents to her hospital room would outweigh the risk of exposure to them. (Wong 754). Davidson does not deny this testimony, stating he does not remember it. (Tr. 380). The record does not fix the date of this conversation with any precision, accordingly, it does not undercut the finding that on the critical date of January 12, Davidson believed that visitors to such patients should be prohibited.

¹¹It is surprising that Dr. Moghissi could not understand what Complainant was trying to do in that memo when Miller, who had input on the possession limits application filed by Temple with the NRC felt that Complainant was going in a direction that would be workable.

benefits. The interest to be paid by Temple on Complainant's back pay and lost benefits is to be calculated at the rate of interest set by 28 U.S.C. §1961. Respondent will be required to expunge negative statements from Mr. Davidson's personnel records.

Finally, Complainant requests compensatory damages for emotional distress and mental anguish. The request is denied. This experience was undoubtedly stressful for Mr. Davidson and his family. Nevertheless, there is no information in this record by way of medical opinion or other evidence demonstrating in any concrete way that Respondent's discriminatory conduct impaired Complainant's ability to conduct the affairs of daily living or to function socially.

RECOMMENDED ORDER

1. Respondent is to forthwith reinstate Scott Davidson to his position as Radiation Safety Director.
2. Respondent is to pay Complainant back pay for the period from February 14, 1994 to the date of reinstatement.
3. Respondent is to reinstate retroactively Complainant's health, pension and insurance benefits.
4. Respondent is to pay Complainant interest on back pay and lost benefits at the rate of interest set by 28 U.S.C. §1961.
5. Respondent is to reimburse Complainant for his expenses connected with his search for employment.
6. Respondent is to expunge all negative statements from Complainant's personnel file.
7. Respondent is to post a copy of the Secretary's decision herein on all bulletin boards where official documents are posted in those units of Temple University subject to the provisions of NRC License No. 37-00697-31. Respondent is further required to ensure that the copies of the decision required to be posted pursuant to the provisions of this order are not altered, defaced or covered by any other material.

THEODOR P. VON BRAND
Administrative Law Judge

TPVB/jbm

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).